Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LUHR BROS., INC.,
Petitioner,

v.

ROBERT HANKS,
Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court for the Fifth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Jones Act, 46 U.S.C. app. § 688(a) (1994), provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...." The questions presented in this case are:

1. Whether Congress intended the defendant in a Jones Act negligence case to have no right to a jury trial and the plaintiff seaman to have the exclusive right to determine whether the case will be heard by a jury.

2. Whether the right to have the case tried to a jury, which this Court has held is part and parcel of the substantive remedy afforded litigants under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* (1994), is extended to Jones Act defendants by the incorporation of the FELA into the Jones Act and § 53 of the FELA, which specifically provides that issues of contributory negligence shall be determined by a jury.

3. Whether a state court's interpretation of the Jones Act so as to find that the defendant in a Jones Act negligence case has no right to trial by jury and only the plaintiff seaman can elect to have the case heard by a jury violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

RULE 29.6 LISTING

Petitioner has no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
HOW THE FEDERAL QUESTION WAS PRESENTED	4
REASONS FOR GRANTING THE PETITION	5
THE HOLDING OF THE ILLINOIS APPELLATE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS AND IS CONTRARY TO FEDERAL STATUTORY LAW. THE CASE ALSO INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.	5
1. The text of the Jones Act and the decisions of this Court and the United States Courts of Appeals construing the Jones Act demonstrate that, contrary to the holding of the Illinois Appellate Court, Congress did not intend to deny a Jones Act defendant the right to a jury trial or to confer that right exclusively to the plaintiff seaman.	6-7

2. The Illinois Appellate Court's holding that the FELA, as incorporated into the Jones Act, confers no right in a defendant to demand a jury trial in a Jones Act negligence case is contrary in principle to a decision of this Court and the United States Courts of Appeals. 10

3. The Illinois Appellate Court's holding that the striking of a Jones Act defendant's jury demand by a state court does not constitute state action and, therefore, does not violate the Equal Protection Clause of the Fourteenth Amendment is in conflict with decisions of this Court. 12

4. The Illinois Appellate Court's ruling involves an important question of federal law that has not been, but should be, settled by this Court. 15

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Norman Bros., Inc., 286 Ill. App. 3d 1091, 678 N.E.2d 317, 222 Ill. Dec. 705 (Ill. App. Ct. 1997) 6

Bailey v. Central Vermont Ry., Inc., 319 U.S. 350 (1943) 11, 16

Balado v. Lykes Bros. S.S. Co., Inc., 179 F.2d 943 (2d Cir. 1950) 8

Baxstrom v. Herold, 383 U.S. 107 (1966) 13, 14

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 15

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 5

Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) 9

Dimick v. Schiedt, 293 U.S. 474 (1935) 15

Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 9, 10, 11, 12

Gibbs v. Lewis & Clark Marine, Inc., 298 Ill. App. 3d 743, 700 N.E.2d 227, Ill. Dec. 126 (Ill. App. Ct. 1998) 3

Gulf, Colorado & Santa Fe R.R. v. Ellis, 165 U.S. 150 (1897) 14, 15

Hanks v. Luhr Bros., Inc., 303 Ill. App. 3d 661, 707 N.E.2d 1266, 236 Ill. Dec. 696 (Ill. App. Ct. 1999) 2, 3, 4, 7, 9

Harbor Tug & Barge Co., 520 U.S. 548 (1997) 5

Jones v. East Tennessee, V. & G. R. Co., 128 U.S. 443 (1888) 11

McDermott Int'l., Inc. v. Willander, 498 U.S. 337 (1991) 5

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 5

Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) 8

Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986) 9

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) 6

Schulz v. Pennsylvania R.R. Co., 350 U.S. 523 (1956) 16

Shelley v. Kraemer, 334 U.S. 1 (1947) 12, 13

The Propeller Genesee Chief, 53 U.S. (12 How.) 443 (1852) 5

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 15-16

Yates v. Dann, 223 F.2d 64 (3d Cir. 1955) 8, 9, 12

Statutes

28 U.S.C. § 1257(a) (1994) 1

28 U.S.C. § 1333 (1994) 8

45 U.S.C. § 53 (1994) 10, 12

46 U.S.C. § app. 688(a) (1994) 7, 10

Other Authorities

U. S. Const., amend. XIV §1 13

OPINIONS BELOW

The opinion of the Appellate Court of Illinois for the Fifth District is reported at 303 Ill. App. 3d 661, 707 N.E.2d 1266, 236 Ill. Dec. 696. Appendix D, *infra*. The Illinois Supreme Court's denial of Petitioner's Petition for Leave to Appeal is reported at 184 Ill. 2d 556.

JURISDICTION

The opinion of the Appellate Court of Illinois for the Fifth District was entered on March 9, 1999. Appendix D, *infra*. On June 2, 1999, the Supreme Court of Illinois denied a Petition for Leave to Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal questions raised in this Petition involve the Jones Act, 46 U.S.C. app. § 688(a), the FELA, 45 U.S.C. § Stet., and Section 1 of the Fourteenth Amendment to the United States Constitution, which are set forth in full in Appendices E-G, *infra*.

STATEMENT OF THE CASE

Respondent Robert Hanks worked as a deckhand employed by Petitioner Luhr Bros., Inc. ("Luhr"). He claimed he slipped and fell on the deck of a vessel. Despite a preexisting low back condition with chronic back pain, and the longstanding receipt of benefits from the military for his service related back injury, Respondent claimed that he was disabled by the fall. Respondent filed suit against Luhr under the Jones Act and General Maritime Law in the Circuit Court of St. Clair County, Illinois, and did not make a demand for trial by jury. Luhr did make a demand for trial by jury. On Respondent's Motion, the trial court struck Luhr's timely demand for trial by jury and subsequently denied Luhr's Motion for Trial by Jury. App. *infra*., A-1 and A-2.

At the non-jury trial, the Respondent presented his medical proof, which included the testimony of his operating orthopedic surgeon. However, the surgeon acknowledged that the lower back abnormality and pain of which the Respondent complained preexisted. After treatment by the surgeon, Respondent was released to medium duty work and was pursuing an education to become an electrician, a job in which he could be expected to earn virtually the same amount of money post-injury as pre-injury. Despite these facts, the Respondent received a non-jury verdict of $901,091.32, which included $390,000 for loss of earnings. App., *infra.*, A-5 The opinion of the Illinois Appellate Court demonstrates that Luhr challenged the allegations of negligence and damages at trial. It contended on appeal that those issues should have been decided by a jury and that the Judge's findings were erroneous and the damages were excessive.

Luhr appealed to the Illinois Appellate Court for the Fifth District, arguing that it was entitled to a jury trial, and raising other issues. The Appellate Court reviewed de novo the trial court's order striking Luhr's jury demand, as it involved the review of federal statutory and constitutional law, and affirmed the trial court.

The Illinois Appellate Court held that federal law controls the right to a jury trial in a Jones Act case. *Hanks v. Luhr Bros., Inc.*, 303 Ill. App. 661, 667, 707 N. E. 2d 1266, 1271, 236 Ill. Dec. 696, 701 (Ill. App. Ct. 1999). It then looked to the Jones Act to determine whether Luhr was entitled to a jury. In construing the Jones Act, the Appellate Court held: "when Congress passed the Jones Act, it made trial by jury a matter for the seaman to decide. Congress wanted the seaman's employer to abide by that decision." *Id.* at 663, 707 N.E.2d at 1268, 236 Ill. Dec. at 698 (citation omitted). Thus, the Appellate Court held that Luhr had no right to a jury trial because the plaintiff seaman has the exclusive right to decide whether the case will be submitted to a

jury or the court. *Id.* at 668, 707 N.E.2d at 1271, 236 Ill. Dec. at 701

The Appellate Court further found that the FELA, as incorporated into the Jones Act, confers no right upon a defendant to demand a jury trial in a Jones Act case. *Id.* at 666, 707 N.E.2d at 1270, 236 Ill. Dec. at 700. Again, the Appellate Court's decision rested upon its interpretation of the Jones Act, as it held that any such construction of the FELA "'would contravene the plaintiff's expressly articulated right to elect a jury trial or nonjury trial'" in Jones Act cases. *Id.* (quoting *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill. App. 3d 743, 750, 700 N.E.2d 227, 232, Ill. Dec. 126, 131 (Ill. App. 1998)).

The Appellate Court concluded finally that Luhr's equal protection rights under the Fourteenth Amendment were not violated because the trial court's striking of Luhr's jury demand did not constitute state action. The Appellate Court relied once again upon its construction of the Jones Act, holding that:

> Since the trial judge merely executed a congressional intent to allow plaintiff the exclusive right to elect a trial by jury and the judge struck a jury demand that Congress did not contemplate, the true source of the alleged disparate treatment was the federal statute itself. Congress conferred on plaintiff the exclusive right to trial by jury, and Congress was not obliged to abide by fourteenth amendment constraints when it did so.

Hanks, 303 Ill. App. 3d at 667-668, 707 N.E.2d at 1271, 236 Ill.

Dec. at 701.[1] Accordingly, the Illinois Appellate Court held that there was no violation of the Fourteenth Amendment as there was no state action necessary to precipitate its guarantees. *Id.*

HOW THE FEDERAL QUESTION WAS PRESENTED

The opinion of the Illinois Appellate Court traces the history of how the federal questions at issue were raised in the court below. *Hanks*, 303 Ill. App. 3d at 665, 707 N.E.2d at 1269, 236 Ill. Dec. at 699.

Luhr first asserted its right to trial by jury in response to the trial court striking its jury demand. On September 18, 1997, Luhr filed its Motion for Trial by Jury and Memorandum in Support in which Luhr argued that the Jones Act does not deny it the right to demand a jury trial. (C. 287-310)[2] Luhr further argued that it was entitled to a jury trial under the FELA and that the striking of its jury demand violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (C. 287-310) The trial court denied Luhr's Motion for Trial by Jury on December 16, 1997. App., *infra.*, A-2.

After the trial court entered judgment in favor of Respondent, Luhr filed its Notice of Appeal and asserted that it was entitled to a jury trial under the Jones Act and the FELA and that the denial of a jury trial violated the guarantee of equal protection

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[1] The Illinois Appellate Court also held that Luhr had no right to a jury trial under the Illinois Constitution. Luhr asserted in the court below that the Illinois Constitution guaranteed the right to a jury trial in this case. The Illinois Appellate Court's finding that a Jones Act defendant has no right to a jury trial under the Illinois Constitution does not constitute independent state law grounds for its decision as the Illinois Appellate Court expressly held that the right to a jury trial is controlled by federal law, namely the Jones Act. *Hanks*, at 667, 707 N.E.2d at 1271, 236 Ill. Dec. at 701. Thus, the Illinois Appellate Court's holding as to Luhr's right to a jury trial under Illinois state law was merely dicta.

[2] Citations to (C._____) are citations to the Court record below.

under the Fourteenth Amendment. (C. 755-58) Luhr also raised these issues in its briefs filed before the Illinois Appellate Court for the Fifth District. The Appellate Court expressly rejected Luhr's arguments in its opinion.

Luhr filed a Petition for Leave to Appeal to the Illinois Supreme Court raising the same arguments with respect to the jury issue that were before the Illinois Appellate Court. The Illinois Supreme Court denied Luhr's Petition for Leave to Appeal.

REASONS FOR GRANTING THE PETITION

THE HOLDING OF THE ILLINOIS APPELLATE COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE UNITED STATES COURTS OF APPEALS AND IS CONTRARY TO FEDERAL STATUTORY LAW. THE CASE ALSO INVOLVES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The uniformity of federal admiralty and maritime law has been a special concern of this Court from the earliest days of the Republic. *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 453-54 (1852). This concern arises, ultimately, from the Constitution's extension of federal judicial power "to all Cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2. Indeed, this Court in the last decade has demonstrated this solicitude in its pronouncements on Jones Act seaman's status. *See, e.g., McDermott Int'l, Inc. v. Willander*, 498 U.S. 337 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug & Barge Co.*, 520 U.S. 548 (1997); *See also, Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (recognizing "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'").

The instant case presents a nascent and fundamental threat to that uniformity. In Illinois, Jones Act plaintiffs' attorneys have begun filing Jones Act complaints without jury demands, and successfully striking the employers' demand for trial by jury. Historically, in Jones Act cases in common law state courts, defendants have received jury trials. The first reported incident in Illinois of a defendant in a Jones Act case being denied a jury trial is *Allen v. Norman Bros., Inc.*, 286 Ill. App. 3d 1091, 678 N.E.2d 317, 222 Ill. Dec. 705 (Ill. App. 1997). The striking of a defendant's jury demand results in a bench trial before elected judges who run for office as candidates of political parties. This instant case is just one in a line of reported cases in Illinois in which modest claims have led to disproportionately large verdicts in such bench tried cases. This is contrary to a proper interpretation of federal law and contrary to accepted trial practice in the several states.

Not only is admiralty and maritime law uniformity at stake, but the right to trial by jury in a civil case is also presented here. This Court has recognized its historical role in safeguarding this important right: "Special and important reasons for the grant of certiorari . . . are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 510 (1957). The decision of the Illinois Appellate Court below is a misinterpretation of the Jones Act and Federal Employers' Liability Act and is a violation of the Equal Protection Clause of the Fourteenth Amendment. For these reasons, as set forth more fully below, the Court should grant certiorari to examine and correct the tear in the uniform fabric of the federal maritime law represented by the decision of the Illinois Appellate Court.

1. **The text of the Jones Act and the decisions of this Court and the United States Courts of Appeals construing the Jones Act demonstrate that, con-**

trary to the holding of the Illinois Appellate Court, Congress did not intend to deny a Jones Act defendant the right to a jury trial or to confer that right exclusively to the plaintiff seaman.

The Illinois Appellate Court's holding that a Jones Act defendant has no right to a jury trial is without foundation in the text of the Jones Act, has no support in the legislative history of the Act and is contrary to interpretations of the statute by this Court and the Federal Circuit Courts. In its opinion, the Illinois Appellate Court proclaims that "[w]hen Congress passed the Jones Act, it made trial by jury a matter for the seaman to decide. Congress wanted the seaman's employer to abide by that decision." *Hanks v. Luhr Bros., Inc.*, 303 Ill. App. 3d 661, 663, 707 N.E. 2d 1266, 1268, 236 Ill. Dec. 696, 698 (Ill. App. Ct. 1999). The Jones Act, however, simply states that a "seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury...." 46 U.S.C. § app. 688(a). Significantly, it does not state that a defendant has no right to a jury trial in a negligence action filed under the Jones Act. Nor does it state that a seaman may, at his exclusive election, determine whether an action for damages filed at law will be tried to a jury or the court. Hence, to hold, as the Illinois Appellate Court did, that Congress intended the Jones Act to grant only the plaintiff the right to a jury trial is without legislative support whatsoever. [3]

The Illinois Appellate Court's interpretation of the Jones Act also conflicts in principle with the construction of the Act by this Court and the United States Courts of Appeals. As this Court

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[3] The legislative history of the Jones Act is also devoid of any suggestion that Congress intended only Jones Act plaintiffs to have the right to a jury trial. It is unfathomable that Congress would create a cause of action in which one party is denied the right to a jury trial without debate or discussion of this point.

held in its first Jones Act case, *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), the true import of the phrase "may maintain" an action at law "with the right of trial by jury" means "that the injured seaman is permitted, but not required, to proceed on the common-law side of the court *with a trial by jury as an incident.*" *Id.* at 390-91 (emphasis added). Applying that precedent, Judge Learned Hand succinctly described the election given plaintiffs under the Jones Act as being "between a trial by jury and a suit in admiralty." *Balado v. Lykes Bros. S.S. Co., Inc.*, 179 F.2d 943, 945 (2d Cir. 1950). Thus, the Jones Act allows the seaman to elect to proceed at law and, if he so elects, the right to a jury trial flows as an incident to that election. The Jones Act does not allow the seaman a two-step election, *i.e.* first to elect to file his claim at law and second to elect a non-jury trial, forcing the defendant to accept that second election.[4]

Furthermore, the Illinois Appellate Court's decision cannot be reconciled with the Third Circuit's opinion in *Yates v. Dann*, 223 F.2d 64 (3d Cir. 1955). In *Yates*, the plaintiff brought his Jones Act claim on the civil side of the federal court and demanded a jury trial. *Id.* at 66. The jury returned a verdict in favor of the plaintiff, but failed to follow the court's instruction as to awarding damages. *Id.* The court awarded a new trial limited to the issues of damages and the plaintiff moved to transfer the suit to admiralty so that the court, not a jury, would decide the remainder of the case. *Id.* Plaintiff's motion was granted over the defendants' objection that such a transfer would deprive them of their right to a jury trial. *Id.*

On appeal, the Third Circuit reversed, finding that the defendants were denied their right to a jury trial on the issues of damages and comparative negligence. *Id.* at 66. The Third

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[4] Respondent's action in this case was necessarily filed "at law," rather than in admiralty, as it was filed in the state court pursuant to the saving to suitors clause, 28 U.S.C. §1333 (1994).

Circuit found that, under Rule 38(d) of the Federal Rules of Civil Procedure, the plaintiff could not transfer the case to admiralty and thus, withdraw his jury demand without the consent of the defendant. The Court stated that "[t]here is nothing in the Jones Act . . . which alters the application of this fundamental guarantee." *Id.* Thus, the Third Circuit concluded that under the Jones Act, the plaintiff does not have the power to unilaterally elect a non-jury trial except by recourse to Rule 9(h) of the Federal Rules of Civil Procedure and the election to proceed in admiralty must occur before trial. *Id.* at 64.[5] The Illinois Appellate Court's decision is in direct conflict with *Yates* as the Illinois Court expressly held that, in enacting the Jones Act, Congress "made trial by jury a matter for the seaman to decide" in cases filed at law in state court and "the seaman's employer [must] abide by that decision." *Hanks*, 303 Ill. App. 3d at 663, 707 N.E.2d at 1268, 236 Ill. Dec. at 698.

The *Yates* decision is consistent with this Court's opinion in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). In *Fitzgerald*, this Court held that a seaman who alleged claims for maintenance and cure and negligence under the Jones Act arising out of the same facts was entitled to a jury trial on both claims. 374 U.S. at 21. In reaching its decision, this Court held that no "statute of Congress or Rule of Procedure, Civil or Admiralty, forbid[s] jury trials in maritime cases." *Id.* at 20. This Court further held that "Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury. . . .

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[5] The decisions of the Fifth Circuit Court of Appeals in *Rachal v. Ingram Corp.*, 795 F.2d 1210, (5th Cir. 1986) and the Ninth Circuit Court of Appeals in *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994) are in conflict with the foregoing thrust of the *Yates* decision. It is submitted that the courts in *Rachal* and *Craig* misconstrued the election given to the plaintiff under the Jones Act and these decisions are in conflict with this Court's decision in *Panama R.R. Co. v. Johnson* , 352 U.S. 500 (1957), and the principles enunciated in *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963).

Therefore, the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactment to try all the claims." *Id.* at 21. Thus, this Court has held that the Jones Act does not prohibit jury trials, but instead expressly provides for trial by jury. The Illinois Appellate Court's decision conflicts with this principle enunciated in *Fitzgerald.*

2. The Illinois Appellate Court's holding that the FELA, as incorporated into the Jones Act, confers no right to a defendant to demand a jury trial in a Jones Act negligence case is contrary in principle to a decision of this Court and the United States Courts of Appeals.

The Illinois Appellate Court, in reaching its decision denying Luhr the right to a jury trial, also misinterpreted the FELA. It held, erroneously, that § 53 of the FELA, which explicitly affords defendants the right to jury trial on comparative fault issues, and which is expressly incorporated into the Jones Act, is overridden by the plaintiff's non-jury election. This is contrary to case law interpreting § 53 of the FELA.

The Jones Act and the FELA are to be read and applied in tandem. The applicable provision of the Jones Act, 46 U.S.C. app. § 688(a), makes "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees" applicable to claims filed pursuant to the Act by seamen. Thus, FELA provisions apply in Jones Act cases.

When Congress imported the FELA into the Jones Act, it brought with the FELA the preference for jury trials in what are essentially negligence cases. In *Schulz v. The Pennsylvania R.R. Co.*, 350 U.S. 523 (1956), this Court held: "The jury trial 'is part and parcel of the remedy afforded railroad workers under the

Employers' Liability Act,' which the Jones Act makes applicable to those working [as crewmen of the tug]." *Id.* at 524 (quoting *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943)). The *Schulz* case involved a crewman of a tug. The railroad was a Jones Act employer.

The Court in *Schulz* granted certiorari to review the trial court's granting of a directed verdict motion. The clear inference of the court's opinion is that as part and parcel of the remedy provided in FELA and Jones Act cases, the defendant, as well as the plaintiff, is necessarily given a right to trial by jury.

The *Schulz* decision also establishes that the role of the jury is an essential part of the trial of Jones Act and FELA cases, in stating that:

> Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[We] think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.'

Schulz, 350 U.S. at 525-26 (quoting *Jones v. East Tennessee, v. & G. R. Co.*, 128 U.S. 443, 445 (1888)). This is no more than a statement of a fundamental principle of this country's system of jurisprudence.

In *Fitzgerald*, this Court characterized the jury as "a time-honored institution in our jurisprudence" in concluding that "Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury." *Fitzgerald*, 374 U.S. at 21.

If the trial by jury is fundamental in deciding negligence issues from the standpoint of the plaintiff, how can it be said to be less fundamental for the defendant? Clearly it is not.

Section 53 of the FELA, 45 U.S.C. § 53, in fact, states that:

> In all actions . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee . . . . (emphasis added).

In holding that 45 U.S.C. § 53 is not applicable to Jones Act defendants because it would contravene the plaintiffs' expressly articulated right to elect a jury trial or non-jury trial, the Appellate Court decision is contrary to the foregoing principle annunciated in *Schulz* and *Fitzgerald*, as well as in *Yates*, 223 F.2d at 64, a case in which § 53 of the FELA was cited as a basis for the Jones Act employer's right to trial by jury of contributory negligence issues. The Third Circuit in *Yates* reversed the trial court's judgment because it had refused to have a jury determine the diminution of damages for contributory negligence. The *Yates* decision thus concludes that 45 U.S.C. § 53 is incorporated into the Jones Act.[6]

3. The Illinois Appellate Court's holding that the striking of a Jones Act defendant's jury demand by a state court does not constitute state action and, therefore, does not violate the Equal Protection Clause of the Fourteenth Amendment is in conflict with decisions of this Court.

The Illinois Appellate Court's holding that the striking of Luhr's jury demand did not constitute state action conflicts with this Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

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[6] Respondent also asserted claims under the General Maritime Law. Under this Court's holding in *Fitzgerald*, Respondent's General Maritime Law claims are to be treated as pendent to the Jones Act claim and are to be tried together to the jury as a matter of convenience.

In *Shelley*, this Court held that a state court's enforcement of restrictive covenants based on race or color constituted state action so as to invoke the Equal Protection Clause of the Fourteenth Amendment. *Shelley*, 334 U.S. at 20. In reaching its decision, this Court acknowledged that "from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials." *Id.* at 18. Moreover, this Court defined the term "state action" broadly for purposes of the Fourteenth Amendment:

> State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power *in all forms*. And when the effect of that action is to deny rights subject to protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

Id. at 20 (emphasis added). Applying this definition, it is clear that the striking of a jury demand by a state court constitutes state action within the meaning of the Fourteenth Amendment.

The decision of the Illinois Appellate Court decision impermissibly denies Jones Act defendants a right that is available to other litigants. This Court has held the denial of the right to a jury trial to a subsection of similarly situated litigants violates equal protection. In *Baxstrom v. Herold*, 383 U.S. 107 (1966), the petitioner, an inmate in a New York state prison, challenged a New York statute that allowed for his civil commitment to a state hospital following the expiration of his penal sentence without a jury trial. The petitioner argued that the statute violated his equal protection rights because New York state law allowed all persons civilly committed, other than those committed at the end of a prison term, de novo review by jury trial of the issue of their sanity. *Id.* at 109. This Court agreed, finding that "the State,

having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Id.* at 111.

The decision of the Illinois Appelate Court works an impermissible discrimination between railroad and Jones Act employers. The Jones Act expressly states that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in Jones Act negligence actions. 46 U.S.C. § 688(a). Thus, the same substantive federal law applies to negligence actions brought under the Jones Act and the FELA. By the Illinois Appellate Court's decision, the maritime employer does not have the right to a jury while railroad employers do. As in *Baxstrom*, this arbitrary denial of the right to a jury trial to Jones Act employers when FELA employers are afforded such a right violates the Fourteenth Amendment's guarantee of equal protection.

This Court has also held that disparate treatment of litigants based solely on their status as either plaintiff or defendant violates equal protection. In *Gulf, Colorado & Santa Fe R.R. v. Ellis*, 165 U.S. 666 (1897), this Court struck down a Texas statute that allowed the plaintiff to recover his attorneys' fees from the defendant railroad because it failed to pay his claim for a colt killed on the railroad tracks. This Court held that the Texas statute violated equal protection because:

> [The railroads] do not enter the court upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not

> receive its equal protection. All this is obvious from a mere inspection of the statute.

Gulf, Colorado, 165 U.S. at 153.

This case cannot be reconciled with *Gulf, Colorado*. Luhr, as a defendant in this case, was treated differently from the plaintiff as the plaintiff had the right to demand and receive a jury trial and Luhr did not. Thus, Luhr and Respondent did not stand equal before the law and did not receive equal protection.

4. The Illinois Appellate Court's ruling involves an important question of federal law that has not been, but should be, settled by this Court.

This case involves a question of sufficient importance to warrant certiorari. This Court declared in a FELA case that: "Special and important reasons for the grant of certiorari. . . are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 510 (1957). It noted that then Rule 19 of the Supreme Court Rules (now Rule 10) authorizes a review by certiorari of state court decisions which, as here, have decided a federal question of substance in a way not in accord with, or in conflict with, applicable decisions of this Court. *Id.* 352 U.S. at 510 n. 25.

The right to trial by jury was "characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy.' (Bk. 3, p. 379). . . ." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935). As this Court proclaimed in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959), "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" (quoting *Dimick*, 293 U.S. at 486). In fact, in *Wilkerson v. McCarthy*, 336

U.S. 53, 55 (1949), a case in which a railroad employee appealed a directed verdict in favor of the railroad on his personal injury claim, this Court expressly granted certiorari "because of the importance of preserving for litigants in FELA cases their right to a jury trial."

Over the years, this Court has jealously guarded the plaintiff's right to a jury trial in cases filed under the Jones Act and FELA. *See Rogers v. Missouri Pac. RR. Co.*, 352 U.S. 500 (1957), *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523 (1956) and *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1943). This Court has not, however, addressed the issue of whether a Jones Act defendant has the right to trial by jury in a negligence case filed under the Act. There is no reasonable basis for any contention that the protection provided by recourse to the right to trial by jury is less important to a Jones Act defendant than to a Jones Act plaintiff.

CONCLUSION

This Court should grant the writ of certiorari because the decision of the Illinois Appellate Court is a serious misinterpretation of the Jones Act and Federal Employers' Liability Act, which results in denial to defendants of a trial by jury. This contravenes the fundamental underpinnings of both Acts, which envision that the jury will decide issues of negligence. If allowed to stand, the decision of the Appellate Court will serve as precedent for other state courts in hearing Jones Act cases. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted

Respectfully submitted,

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